IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GREGORY KERNS	:	CIVIL ACTION
	:	
v.	:	
	:	
CHALFONT-NEW BRITAIN TOWNSHIP	:	
JOINT SEWAGE AUTHORITY	:	NO. 99-1596

MEMORANDUM AND ORDER

Fullam, Sr. J. April , 2000

Plaintiff was hired as the superintendent of the defendant's waste-disposal plant. As a condition of his employment, he was required to undergo drug testing by urinalysis. When the first test was performed, shortly after plaintiff entered upon the job, the reported result of the test showed marijuana use. Plaintiff insisted that he had not used marijuana, so a new test was conducted a few days later. Plaintiff passed the second test.

Defendant asserts, and plaintiff denies, that plaintiff was then told that he would be subject to further random testing in the future. At any rate, plaintiff was required to undergo a third test a couple of months later. He tested positive for marijuana use, and was discharged from employment. Plaintiff was afforded an opportunity to have an expert of his own choosing review the test protocol, but his expert reported that he was

unable to find any basis for challenging the accuracy of the test results.

When plaintiff was first informed that he would be required to undergo drug testing, he readily acceded to the request ("sure; no problem"), nor did he ever object to any of the tests which were administered. He was discharged from employment before completing his probationary period. He now sues, claiming his constitutional rights were violated. Both sides have moved for summary judgment.

Initially, the defendant argues that, as a municipal body, it cannot be held liable for constitutional violations committed by its employees, but only for its official policies. Since plaintiff can point to no written policy mandating drug testing of all employees (there is a written policy with respect to testing certain truck drivers, pursuant to requirements of the Pennsylvania Department of Transportation) defendant contends plaintiff cannot prevail. I disagree. It is clear that the persons who hired plaintiff as a plant superintendent were indeed policy-makers, and it is clear that, in requiring the testing of plaintiff, they were acting pursuant to a recognized policy, albeit perhaps not a written one. Thus, if plaintiff's constitutional rights were violated as a result of the testing requirement, the defendant itself can be held liable in damages.

But I am satisfied that the undisputed facts of this case do not establish any constitutional violation. A governmental employee's expectation of privacy depends in large part upon the nature of his employment and whether it poses a potential threat to public safety. National Treasury Employees v. Von Raab, 489 U.S. 565 (1989); Wilcher v. City of Wilmington, 139 F.3d 366 (3d Cir. 1998) (because of the perils associated with fire fighting, fire fighters have a diminished expectation of privacy and may constitutionally be subjected to drug testing); Policeman's Benevolent Ass'n Local 318 v. Township of Washington, 850 F.2d 130 (3d Cir. 1988) (drug testing of police officers is constitutionally permissible, since they are heavily regulated and occupy safety-sensitive positions); Transport Workers' Local Union 234 v. SEPTA, 884 F.2d 709 (3d Cir. 1988) (random drug testing of rail operators permissible because of safety concerns).

It is true that the superintendent of a sewer plant can be said to pose less potential threat to public safety than a locomotive engineer or a police officer, but a mistake in the operation of a sewage disposal plant can nevertheless have disastrous consequences. Defendant and its employees are heavily regulated by the Pennsylvania Department of Environmental Protection and the Federal Environmental Protection Agency. See,

33 U.S.C. §1251 et seq.; 35 P.S. §691.1 and accompanying regulations. Plaintiff and the employees he was required to supervise regularly used hazardous chemicals, machinery, rotating equipment, etc. In my view, it was, as a matter of law, entirely reasonable for the defendant to insist upon a drug-free staff; and plaintiff's legitimate expectations of privacy were lessened, to that extent. In the only reported case brought to my attention in which waste-plant operators were involved, the court concluded that drug testing was reasonable and not a Fourth Amendment violation. Bailey v. City of Baytown, 781 F.Supp. 1210 (S.D. Tex. 1991).

I note also that there is authority for the proposition that pre-employment drug testing is more readily justified than post-employment testing. Willner v. Thornburgh, 928 F.2d 1185 (D.C. Cir. 1991). The distinction is based on the proposition that, since private employers are free to require drug testing without restrictions, governmental entities must be free to administer pre-employment drug tests since, otherwise, drug users would be encouraged to seek government employment, rather than work in the private sector. Be that as it may, I am satisfied that, as a matter of law, safety concerns and the plaintiff's consent rendered these tests constitutionally permissible. Moreover, the second and third tests were not truly random, but

were based upon reasonable suspicion generated by the pre-employment exam. And finally, since plaintiff was still a probationary employee and could have been discharged for little or no reason, the asserted violation of constitutional rights would not have generated significant economic losses, even if a violation could have been found. Defendant's motion for summary judgment will be granted.

An Order follows.

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ORDER

AND NOW, this day of April, 2000, IT IS ORDERED:

1. Plaintiff's Motion for Partial Summary Judgment is DENIED.

2. Defendant's Motion for Summary Judgment is GRANTED.

3. Judgment is entered in favor of the defendant Chalfont-New Britain Township Joint Sewage Authority, and against the plaintiff Gregory Kerns.

John P. Fullam, Sr. J.